Supreme Court, U.S.
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No. 01-1566

In The
Supreme Court of the United States

LINDA C. HAWKINS, TRUSTEE,
HAWKINS FAMILY TRUST,

Petitioner,

v.

VASTAR RESOURCES, INC.;
OKLAHOMA CORPORATION COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The Oklahoma Supreme Court

RESPONDENT VASTAR RESOURCES, INC.'S, BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTIONS PRESENTED

Whether the forced pooling procedure in Oklahoma pursuant to 52 OKLA. STAT. § 87.1 (2001) is constitutional under the Constitution of the State of Oklahoma and the Constitution of the United States.

Whether Petitioner's mineral interest may be force pooled in a drilling and spacing unit without her consent or waiver of her rights.

Whether Petitioner must pay her proportionate share of costs of the proposed oil and gas well in order to perfect an election to participate in the proposed well.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Effective December 31, 2001, Respondent, Vastar Resources, Inc., merged with and into Amoco Production Company, and the surviving corporation's name was changed to BP America Production Company, a Delaware corporation. BP America Production Company is ultimately a wholly owned subsidiary of BP p.l.c. whose stock is publicly traded on the New York Stock Exchange.

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RESPONDENT'S BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

On April 17, 2000, Respondent, Vastar Resources, Inc., ("Vastar") filed an application with the Oklahoma Corporation Commission ("Commission") to require the pooling of the working interests[1] of oil and gas owners in sixteen separate common sources of supply of oil and gas in the 640-acre drilling and spacing units formed therefor in Section 7, Township 4 North, Range 20 East of the IM, Latimer County, Oklahoma. The process of requiring the pooling of such working interests is referenced within the regulatory and statutory framework as "forced pooling." Petitioner, Linda Hawkins, individually and as Trustee for the Hawkins Family Trust (collectively, "Hawkins"), formally protested Vastar's application to pool her working interest.

At the hearing before the Commission's Administrative Law Judge ("ALJ"), Vastar's expert witness testified that Vastar had attempted, but was unable, to reach an agreement with Hawkins on pooling her interest. Vastar had offered Hawkins the opportunity to participate in drilling the proposed oil and gas well by paying her proportionate share of the cost of the proposed well. In lieu of participating as a working interest owner in the well, Vastar offered Hawkins a choice of three different combinations of cash bonus and royalty payments. Hawkins refused any of the options offered by Vastar.

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[1] The owner of a working interest has the right to exploit the minerals on the land. HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS TERMS 1806 (7th ed. 1987).

At the hearing before the ALJ, Hawkins did not dispute the testimony of Vastar's witness. Instead, Hawkins argued that the Commission had no jurisdiction to force pool her mineral interest without her consent. Hawkins suggested that pooling her mineral interest involved "purely private matters in which public interests are not involved."

The ALJ issued a report recommending that Hawkins' mineral interest be force pooled in accordance with the various options offered to her by Vastar. In her report, the ALJ summarized and rejected Hawkins' legal arguments, noting that the Commission had previously rejected substantially the same arguments in several other proceedings in which Hawkins had been a party. Hawkins' appeal of the ALJ's report was referred to the Commission's Oil and Gas Appellate Referee. The Appellate Referee affirmed the ALJ's report. The Commission adopted the findings and recommendations of the ALJ, as recommended by the Appellate Referee, and issued an order pooling Hawkins' mineral interest.

Hawkins appealed the Commission's pooling order. The Court of Civil Appeals of the State of Oklahoma unanimously affirmed the Commission's pooling order. Hawkins' Petition for Writ of Certiorari to the Oklahoma Supreme Court was denied without opinion.

Hawkins now seeks to appeal from the Oklahoma Supreme Court's decision denying Hawkins' Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. HAWKINS HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." SUP. CT. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Hawkins has not presented any compelling reason for this Court to exercise discretionary jurisdiction over her appeal of the Oklahoma Supreme Court's decision denying her Petition for Writ of Certiorari.

II. THE COMMISSION'S POOLING ORDER IS A CONSTITUTIONAL EXERCISE OF THE COMMISSION'S AUTHORITY.

In Oklahoma, the forced pooling procedure is provided for in 52 OKLA. STAT. § 87.1 (2001) ("Section 87.1"). Pursuant to Section 87.1(e):

> When two or more separately owned tracts of land are embraced within an established spacing unit, or where there are undivided interests separately owned, or both such separately owned tracts and undivided interests embraced within such established spacing unit, the owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owners have not agreed to pool their interests and where one such separate owner has drilled or proposes to drill a well on said unit to the common source of supply, the Commission, to avoid the drilling of unnecessary wells, or to protect correlative rights, shall, upon a proper application therefor and a hearing thereon, require such owners to

> pool and develop their lands in the spacing unit as a unit.

52 OKLA. STAT. § 87.1(e) (2001).

While it is somewhat difficult to follow the legal argument presented by Hawkins in her Petition, it appears that Hawkins' main premise is that it is unconstitutional for the Commission to force pool her mineral interest without her consent. Hawkins suggests that she has the constitutional right *not* to be force pooled and that the only way in which the Commission has the jurisdiction to enter a pooling order affecting her oil and gas interests is with her consent. Hawkins further suggests that without her consent to be pooled, thereby conferring jurisdiction on the Commission, she is entitled to enjoy the benefits associated with participating in the proposed oil and gas well without paying her share of the costs of drilling, completing, and equipping the well up front. Hawkins seems to contend that Vastar should be required to bear the expense and risk of developing her mineral interest. Hawkins further argues that if the proposed well is productive, her share of well costs may be deducted from the production proceeds allocated to her interest.

In this case, Hawkins contends that the Commission's pooling order is unconstitutional and beyond the jurisdiction of the Commission because she did not waive her constitutional rights nor consent to the pooling order so as to confer jurisdiction on the Commission. Hawkins asserts that without her waiver and consent, the Commission's pooling order cannot effectively transfer her working interest to Vastar because such transfer would be a constitutionally prohibited taking of private property for private use.

The constitutionality of forced pooling has been settled by the Oklahoma Supreme Court for many years. Oklahoma law is clear that private property interests must yield to the greater interests of the State in the conservation and development of its natural resources, including the entry of pooling orders affecting such private property interests, on terms that are just and reasonable and will afford owners the opportunity to recover or receive without unnecessary expense their just and fair share of the oil and gas. Contrary to Hawkins' claims, the constitutionality of forced pooling has never been based on whether the owner being pooled waives his or her constitutional rights and consents to the pooling proceeding, so as to vest the Commission with proper jurisdiction.

The Commission's pooling order is constitutional and in full compliance with the requirements of applicable Oklahoma law.

A. Forced Pooling is Constitutional.

In *Anderson v. Corporation Comm'n*, 327 P.2d 699 (Okla. 1957), the Oklahoma Supreme Court considered a challenge to the constitutionality of forced pooling under 52 OKLA. STAT. § 87.1 (1951). In *Anderson*, the unleased mineral interest owner (Anderson) asserted that the subject pooling order, entered pursuant to Section 87.1, violated both the State and United States Constitutions because it amounted to a taking of private property for private use without due process of law.

Rejecting this argument and upholding the constitutionality of the statute, the Oklahoma Supreme Court explained that petroleum and petroleum products are the most important of natural resources. *Anderson*, 327 P.2d

at 701. In order to minimize overproduction and waste for the benefit of the general public, the State, through its police power, had to curtail an individual's rights to develop and produce petroleum products. *Id.* Well spacing laws were therefore enacted to curtail drilling, which curtailment often resulted in serious inequalities and inequities between owners. In order to protect the correlative rights of the owners, unitization and pooling procedures were established to ensure that the State's exercise of the police power in the conservation of natural resources would not effect too serious an unbalancing of correlative rights. *Id.* The *Anderson* court concluded that the pooling order in question was authorized by Section 87.1 as a necessary and integral part of securing the correlative rights of the parties. *Id.*

The *Anderson* court recognized that the Oklahoma Supreme Court had previously, on several occasions, held the unitization and pooling statutes to be constitutional. *Id.* at 702. Referring to previous decisions, the court stated:

> All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person and property or will result in loss to individuals. The infliction of such loss is not a deprivation of property without due process of law; the exertion of police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law.

Id. (quoting *Patterson v. Stanolind Oil & Gas Co.*, 77 P.2d 83 (Okla. 1938) and *Croxton v. State*, 97 P.2d 11 (Okla. 1939)).

The *Anderson* court, in concluding that the pooling order was not an unconstitutional taking of property, stated:

> The order complained of did not constitute a taking of property of Anderson in any manner. It granted him the right to participate in the production from a well on Ellison's property, but on condition that certain requirements were met. The limitation of one well to eighty acres was a proper exercise of the police power in furtherance of the conservation of natural resources. That he was allowed to share in the production or to receive a bonus instead of that participation was a grant to him at the expense of Ellison merely because of the recognition of correlative rights. On the other hand, Ellison was not deprived of anything because he was granted the right to drill the only well which would be permitted on the eighty acre drilling unit upon condition that Anderson . . . could participate in the production upon payment of his part of the cost. Both were forced to co-operate for the benefit of both and for the protection of the public generally.

Id. at 702-03.

Furthermore, in discussing the constitutionality of the pooling statute, the *Anderson* court quoted the United States Supreme Court in *Hunter Co. v. McHugh*, 320 U.S. 222 (1943), in which this Court stated:

> A state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment.

Id. at 703. Based on these foregoing authorities, the *Anderson* court reaffirmed the constitutionality of pooling as a valid exercise of the State's police power pursuant to both the State and United States Constitutions. *See also Kardokus v. Walsh*, 797 P.2d 322, 323 (Okla. 1990); *Spiers v. Magnolia Petroleum Co.*, 244 P.2d 852 (Okla. 1951); *Palmer Oil Corp. v. Phillips Petroleum Co.*, 231 P.2d 997 (Okla. 1951); *Croxton v. State*, 97 P.2d 11 (Okla. 1939); *Patterson v. Stanolind Oil & Gas Co.*, 77 P.2d 83, 89 (Okla. 1938).

The Oklahoma Supreme Court has consistently upheld the constitutionality of forced pooling pursuant to Section 87.1. Hawkins fails to explain how any legal authority cited in her Petition would support a position contrary to *Anderson*. Mere assertion of legal principles, even if otherwise correct, is of no avail if circumstantially irrelevant. *Anderson*, therefore, is dispositive of Hawkins' jurisdictional and constitutional contentions regarding the Commission's power to require her to pool her oil and gas interest with that of others in drilling and spacing units.

B. The Commission May Force Pool Hawkins' Mineral Interest Without Her Consent or Waiver of Her Rights.

Hawkins appears to assert that because her mineral interest constitutes a private right, the Commission is without authority or jurisdiction under Section 87.1(e) to pool her mineral interest absent her consent to the Commission's jurisdiction and waiver of her rights. Hawkins appears to argue that once an owner consents to a pooling proceeding so as to confer jurisdiction on the Commission under Section 87.1(e), the Commission may enter a pooling order affecting such owner's interest. Hawkins, however,

misunderstands the nature of her mineral interest and the authority of the Commission vis-á-vis her mineral interest.

The Commission is a tribunal of limited jurisdiction, and it has only such jurisdiction and authority as is expressly or by necessary implication conferred upon it by the Constitution and statutes of the State of Oklahoma. *Kingwood Oil Co. v. Hall-Jones Oil Corp.*, 396 P.2d 510, 513 (Okla. 1964). The basis for the enactment of Oklahoma's oil and gas conservation laws, including Section 87.1, is to prevent waste and to protect correlative rights. *Miller v. Corporation Comm'n*, 635 P.2d 1006, 1007 (Okla. 1981); *Inexco Oil Co. v. Corporation Comm'n*, 628 P.2d 362, 364 (Okla. 1981). The term correlative rights involves the relative rights of owners in a common source of supply to take oil or gas by legal operations limited by duties to the other owners not to injure the common source of supply, and not to take an undue proportion of the oil and gas. *Kingwood*, 396 P.2d at 512.

In *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 687 P.2d 1049 (Okla. 1984), the Oklahoma Supreme Court explained that the purpose of 52 OKLA. STAT. § 81 *et seq.* [now 52 OKLA. STAT. § 86.1 *et seq.*], is the conservation of oil and gas. *Tenneco*, 687 P.2d at 1052. Under the statutes, the Commission is vested with the duty to prohibit and control waste and protect correlative rights. *Id.* The entry of a pooling order pursuant to these statutes is a function of the Commission that is within the realm of the public rights to be protected by these statutes. *Id.* A forced pooling order represents the interest of consumers and mineral interests and prevents the "dog in the manger" attitude that would deny economic development. *Id.*

The Oklahoma Supreme Court addressed the Commission's power to force pool mineral interests under Section 87.1 in *Samson Resources Co. v. Corporation Comm'n*, 702 P.2d 19 (Okla. 1985). In *Samson*, the court recognized that the power to protect correlative rights is limited by the terms of Section 87.1. *Samson*, 702 P.2d at 22. Under Section 87.1(e), the Commission is provided various avenues for the exercise of the Commission's jurisdiction over the public interest in correlative rights. *Id.* Thus, in a drilling and spacing unit in which owners are not able to agree regarding voluntary development, the Commission is empowered under Section 87.1(e) to pool the owners' interests and to monitor certain terms and conditions of the contract imposed on the parties through a pooling order, thereby allowing an orderly development of the common source of supply. *Id.* at 23.

The Oklahoma Supreme Court has upheld on numerous occasions the jurisdiction of the Commission to force pool mineral interests in a drilling and spacing unit pursuant to Section 87.1(e). The Commission's pooling power is grounded in its duty to prevent waste and to protect correlative rights. Contrary to Hawkins' assertion, the Commission's ability to force pool her mineral interest is not dependent on her consent to be pooled, or a waiver of an alleged right not to be pooled. Under Hawkins' theory, the ability of the Commission to protect public rights in the development and production of oil and gas through the entry of a pooling order under Section 87.1(e) is solely dependent upon whether the particular owner consents to be pooled and confers jurisdiction on the Commission. In other words, Hawkins contends that the Commission may exercise the police power of the State of Oklahoma under Section 87.1(e) to force pool an owner's

interest if, and only if, the owner agrees to it. Under Hawkins' theory, a mineral owner who does not consent or agree to a pooling order is beyond the Commission's jurisdiction. Hawkins' theory is fundamentally flawed because it is contrary to the very purpose of Section 87.1(e).

Hawkins' mineral interest clearly falls under the jurisdiction of the Commission pursuant to Section 87.1(e), regardless of any consent or waiver by Hawkins. The Commission's authority to issue the pooling order in this case is unquestionably proper.

III. THE POOLING ORDER REQUIRING HAWKINS TO PAY HER PROPORTIONATE SHARE OF COSTS IS PROPER.

As a condition to perfecting an election to participate in the proposed well, the pooling order requires Hawkins to pay, or provide satisfactory security for the payment of, her proportionate share of the estimated cost of the proposed well within 20 days of the date of the order. Based on Hawkins' interpretation of Section 87.1(e), she contends that because she has not consented to the pooling, there can be no sale or transfer of her mineral interest under the pooling order and she is entitled to have her proportionate share of the well costs deducted from her proportionate share of the revenue from production, if any, from the proposed well. Hawkins appears to further contend that once Vastar has recovered Hawkins' share of the costs of the proposed well from production revenues, Hawkins would then receive her proportionate share of the revenues from the well, preventing Vastar, as the risk-taker, from making any profit from her interest.

Hawkins' reading of Section 87.1 is misguided and would require Vastar to bear the entire risk of loss in connection with the proposed well in regard to Hawkins' interest. This is exactly the result Section 87.1(e) seeks to prevent. Hawkins' interpretation of Section 87.1(e) is simply not supported by Oklahoma law.

A. Section 87.1(e) Does Not Require Vastar to Bear the Risk of Loss as to *Hawkins'* Interest.

In *Ranola Oil Co. v. Corporation Comm'n*, 752 P.2d 1116 (Okla. 1988), the Oklahoma Supreme Court in reviewing a pooling order was faced with the issue of whether the acceptance of a bonus in lieu of participation in an oil and gas well operated as an assignment and prevented the bonus taker from participating as a matter of right in subsequent wells. In discussing the purpose of a pooling order entered under Section 87.1, the court stated as follows:

> The purpose of forced pooling is to equalize the risk of loss by forcing all of the oil and gas interest owners to choose in advance whether they will share in both the benefits and the risks of oil and gas exploration.
>
> . . . .
>
> By accepting the bonus, Wilver elected not to take the risk of reducing to capture the oil and gas in the Mississippi Lime formation. To allow Wilver's successor in interest to reap the rewards of development while avoiding the risks would be inequitable.

> On the other hand, the operator assumed the risk of capture. If the original well proved to be a dry hole or did not produce in paying quantities, the participants alone assumed that loss. Since the original well was successful, the participants should be permitted to reap the benefits of their venture in the original well and in the three increased density wells. Furthermore, to permit Ranola to retroactively participate in the three increased density wells would divest the operator's vested interest in violation of substantive due process.

Ranola, 752 P.2d 1119-1120.

The *Ranola* court further stated that when the owner of a mineral interest is force pooled and elects to take a bonus in lieu of participating in the cost of drilling the well, such election acts as a sale of the owner's leasehold rights. *Id.* at 1118-1119. The court concluded that the exercise of Section 87.1 in such a manner was not unconstitutional but was a proper exercise of the police power. *Id.* at 1119. Once the period for the elections designated by the pooling order has passed, the property interests of the affected parties become vested and once vested, are not vulnerable to extinguishment. *Id.* The court explained that acceptance of the cash bonus acted as an assignment to the operator of the mineral owner's exploratory rights in the formation covered by the pooling order. *Id.*

The court concluded that once the operator under the pooling order had acquired the interests from the mineral owner and had assumed the risk of the oil and gas exploration, the operator should reap the rewards of the risk-taking. *Id.* at 1120. It would be inequitable and unreasonable to allow the mineral owner who had avoided

the risk-taking to reap any of the rewards of the development. *Id.*

The court in *Ranola* relied on the analysis set forth in *Amoco Production Co. v. Corporation Comm'n*, 751 P.2d 203 (Okla. Ct. App. 1986) (adopted by the Oklahoma Supreme Court, December 16, 1987). In *Amoco,* the court recognized that an election not to participate under a pooling order transfers by operation of law the right to drill of the affected owner in the applicable drilling and spacing unit. *Amoco,* 751 P.2d at 206. The measure of compensation for the forcibly pooled minerals is their "fair market value." *Id.* The court commented that it was not reasonable to strip a prudent operator of the property rights he had purchased under the pooling order. *Id.* at 207. Once the unit is pooled and the time for elections has passed, the interests become vested and beyond the Commission's reach to modify, and such rights are no longer vulnerable to extinguishment. *Id.*

The *Amoco* court further recognized that once a party had acquired the interest under a pooling order and had assumed the risk of development in connection therewith, such party was an original risk-capital investor. *Id.* Once the operator relies on the unit as created by the Commission, new elections under the pooling order deprive the original risk-capital investors of rights earned by taking the risk of the initial well. *Id.* An order that would grant a non-risk-capital investor a second election under a pooling order would constitute a deprivation of the property rights of the original risk-capital investors. *Id.* The court clearly recognized that the effect of a pooling order is to allocate the risk prior to development occurring and that once the risk of development is allocated under the pooling order, the parties assuming the risk, being the original

risk-capital investors, should reap the benefits of the risk-taking and retain the rights earned by such risk-taking. *Id.*

Hawkins' misguided interpretation of Section 87.1(e) would not equalize the risk of loss prior to development of the drilling and spacing units. Rather, Vastar would assume all of the risk of loss in regard to Hawkins' mineral interest and Hawkins would reap the rewards of the development while avoiding any risk. Under Hawkins' theory, without her consent to the pooling, she does not have to pay any of the well costs. Vastar must instead recover such costs from Hawkins' share of production which may be insufficient. Once Vastar recovered Hawkins' costs, Hawkins would receive the production from the well and recoup the benefits of the risk-taking by Vastar.

Under Hawkins' theory, Vastar would be the original risk-capital investor, but would be deprived of the rights earned under the pooling order by taking the risk of the proposed well. Hawkins' interpretation of Section 87.1(e) is diametrically opposed to the very purpose and intent of a pooling order and would result in the very thing that a pooling order is intended to prevent. In fact, the position asserted by Hawkins is the very result that would occur if Vastar had not sought a pooling order covering her interest in the drilling and spacing units.

The Commission's pooling order in this case provides the mechanism for fairly and properly equalizing the risk of loss as to the initial unit well by requiring Hawkins to elect whether she will be an original risk-capital investor by participating and assuming a portion of the risk of loss, or whether she will assume no risk of loss and receive the specified royalty (and any corresponding cash bonus), with

her working interest passing to Vastar under the pooling order. If Hawkins elects to participate as an original risk-capital investor, she must perfect such election by paying or providing satisfactory security for the payment of her share of the well costs within 20 days from the date of the pooling order.

B. Hawkins Must Pay, or Provide Security for Payment of, Her Proportionate Share of Costs Prior to Drilling.

Section 87.1(e) provides that a pooling order shall be upon terms and conditions as are just and reasonable, and will afford each owner in the applicable unit the opportunity to recover or receive without unnecessary expense such owner's fair share of the oil and gas. The statute further provides that a pooling order shall make definite provisions for the payment of the cost of the development and operation and that if there is a dispute relative to such costs, the Commission shall resolve such dispute by determining the proper costs.

Implicit in the language of Section 87.1(e) is the authority of the Commission to include in a pooling order a provision requiring an owner, who elects to participate as a working interest owner, to pay or provide satisfactory security for the payment of the owner's proportionate share of the well costs within a specified time period in order for the owner to perfect the election to participate. Pooling orders routinely give owners the choice of agreeing to participate by paying the owner's proportionate share of the well costs or furnishing security therefor within several days of the order. *See, e.g., Crest Resources and Exploration Corp. v. Corporation Comm'n*, 617 P.2d 215, 218 (Okla. 1980); *Home-Stake Royalty Corp. v. Corporation*

Comm'n, 594 P.2d 1207, 1207-10 (Okla. 1979); *Coogan v. Arkla Exploration Co.*, 589 P.2d 1061, 1062 (Okla. 1979).

In *Anderson v. Corporation Comm'n*, 327 P.2d 699 (Okla. 1957), the Oklahoma Supreme Court addressed an argument very similar to the argument presented by Hawkins in this case. In *Anderson*, the plaintiff contended that his proportionate share of the well costs could be recovered under a pooling order only by deducting such costs from production if the well proved to be productive. In analyzing this issue, the court discussed cases involving municipal zoning ordinances controlling drilling. These ordinances were the predecessors to the conservation laws in Oklahoma. The *Anderson* court found that the relationship among the applicable parties existing by reason of the municipal zoning ordinances was identical to the relationship among the owners in a drilling and spacing unit under Section 87.1. *Anderson*, 327 P.2d at 702. The court noted that in *Phillips Petroleum Co. v. Davis*, 147 P.2d 135 (Okla. 1944), the Oklahoma Supreme Court had remarked:

> The rights of non-leasing owners of lots are entirely the creations of the ordinance. The purpose and intent of the ordinance is to require lot owners to bear his proportionate share of the expense in order to participate in the production. If the owner leases his lot, he is thereby relieved from paying his part of the expenses. It is the intent of the ordinance that he pay or secure payment of his part of the expense in order to share in the whole production. *In equity, he ought not to be permitted to stand by and see the operator take all the chances of failure and come in and pay or offer to pay only after the venture has proved successful.*

Id. (emphasis added).

Furthermore, in *Anderson*, the court relied on the analysis set forth in *Amis v. Bryan Petroleum Corp.*, 90 P.2d 936 (Okla. 1939). In *Amis*, the Oklahoma Supreme Court construed a city ordinance regulating oil and gas development and production, similar to Section 87.1. The ordinance authorized the board of adjustment to make orders it found equitable and just regarding allocation of production to unit ownership. The plaintiff objected to the board's order requiring him to post bond as a condition to the right to participate in the working interest. The court determined the bond was proper, reasoning:

> If the board in the exercise of its equitable powers thought it proper to allow the protestant to participate in the working interest without becoming obligated upon the operators' bond then as an equitable principle it could require as a condition precedent to the exercise of that privilege a bond to reimburse the operators for the expense incurred by them in carrying him for an interest in the well; and a time limit within which to post the bond was entirely proper. He must elect whether he shall accept the bonus or post bond and participate in the working interest. Though the ordinance may not specifically authorize the board to require the bond in question, its order in that respect was justified as a proper exercise of its equitable powers to protect and safeguard the rights of the parties. . . . If he fails to post bond in the time allowed by the board or court on the appeal he will be presumed to have elected to accept the bonus. Here the protestant failed to post bond and failed to supersede the judgment of the district court. He is entitled to the bonus and royalties as fixed by the judgment, but may not now post bond and participate in the working interest.

Amis, 90 P.2d at 939-40. The foregoing authorities clearly show that the Commission under Section 87.1(e) is authorized to include in a pooling order a requirement that a party, who has elected to participate as a working interest owner, pay or provide satisfactory security for the payment of such party's share of the well costs in order to perfect and preserve the right to so participate.

Hawkins' interest is not the only one to be protected under the Commission's pooling order. Section 87.1 requires that a pooling order "be upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas." 52 OKLA. STAT. § 87.1(e); *Amoco Production Co. v. Corporation Comm'n*, 751 P.2d 203, 206-07 (Okla. Ct. App. 1986) (adopted by the Oklahoma Supreme Court, December 16, 1987). The statute also requires that the pooling order "make definite provisions for the payment of cost of the development and operation." 52 OKLA. STAT. § 87.1(e). Vastar is an "owner" covered and protected by Section 87.1(e). Hawkins' construction of Section 87.1 would result in Vastar bearing the entire risk and expense attributable to Hawkins' interest and would impose upon Vastar unreasonable and unnecessary expenses, denying Vastar an opportunity to recover or receive its fair share of the oil and gas without unnecessary expense. Hawkins' construction of Section 87.1 is contrary to the very wording of such section. Furthermore,

Hawkins' construction would result in waste which the Commission is required to prevent.[2]

Setting aside the fact that Oklahoma courts have consistently rejected Hawkins' interpretation of Section 87.1, Hawkins' arguments make no logical or practical sense. If a respondent to a forced pooling order is allowed to "ride the well down" or be carried for an interest in the well at the expense of those proposing to drill, Section 87.1(e) would be meaningless. Those parties otherwise proposing to drill will not be able to justify the tremendous increase in risk for the same share of reserves. Wells which would otherwise be drilled will not be drilled and hydrocarbons will be left in the ground. Indeed, the very reason that the statute is commonly called the "forced pooling" statute is that it equalizes the risk of loss by forcing owners to make a choice: either put up their share of costs, or accept a fair market value alternative. Without the Commission's ability to force pool owners, an ability long recognized by Oklahoma law, neither Oklahoma's oil and gas industry nor its mineral owners will be able to

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[2] Waste consists of unreasonable production or unreasonable nonproduction of oil and gas. *Storck v. Cities Service Gas Co.*, 575 P.2d 1364, 1368 (Okla. 1977). A loss of ultimate recovery is nothing more nor less than waste. *Gilmer Oil Co. v. Corporation Comm'n*, 61 P.2d 22, 24 (Okla. 1936). Underground waste is committed by leaving underground minerals which any prudent operator would not hesitate to drill for. *Application of Peppers Refining Co.*, 272 P.2d 416, 424 (Okla. 1954). If operators were required under Section 87.1 to bear the risk and expense of owners who refuse to pay their proportionate share of costs, such owners would, naturally, adopt a "wait and see" attitude potentially gaining every benefit while suffering none of the risk. The result for the State would be that much of the State's resources would remain forever unproduced, resulting in a waste of valuable natural resources.

receive the benefit of the State's natural resources. This was the very reason the pooling statute was enacted.

The Commission's order pooling Hawkins' mineral interest is a proper exercise of the State's right and obligation to balance and protect the rights and interests of its citizens, mineral interest owners, and to prevent the waste of important natural resources.

CONCLUSION

For the foregoing reasons, Respondent, Vastar Resources, Inc., asks that this Court deny the Petition.

Respectfully submitted,

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